MOTION FILED
MAR 30 1984

83-1451
No. 83-1431

IN THE

Supreme Court of the United States

October Term, 1983

Dr. Charles McDaniel, et al.,
Petitioners,

v.

Georgia Association of Retarded Citizens, et. al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Amici Curiae Brief of the National School Boards Association and National Association of Secondary School Principals in Support of Petition for Writ of Certiorari

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Motion of National School Boards Association and National Association of Secondary School Principals for Leave to File Brief as Amici Curiae

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The National School Boards Association and National Association of Secondary School Principals move this court for leave to participate as amici curiae herein for the purpose of filing the attached brief.

The National School Boards Association is a nonprofit federation of state public school boards associations,

which represent local school boards having responsibility for the education of more than ninety-five percent of this nation's school children.

Every school district in the country receives, or is eligible to receive, financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401 et seq. (the Act). In addition, every school district in the country receives or is eligible to receive, other federal financial assistance and, therefore, is subject to the requirements of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), even if no financial assistance is received under the Education for All Handicapped Children Act. Respondents rely on both acts in asserting their claim that the Petitioners are violating the rights of handicapped children.

The decision below will have a substantial effect on the content, financing and administration of the educational program of every school district in the country. It is, therefore, of great importance to the full understanding of the implications of this action, that the court herein be fully apprised of the nature of education programs throughout the country and the potential effects of such a decision on those programs.

A 1981 study commissioned by the U.S. Department of Education, The Cost of Special Education, conducted by the Rand Corporation, found that the cost of educating handicapped children is 2.17 times greater than the cost of educating a non-handicapped child. An education for a severely retarded child cost, in 1977-78, an average of $5926 annually. The cost of educating handicapped

children is twice that of that "average" child, with costs for educating handicapped children and youths rising at a rate twice that of instructional or operating budgets. Few school districts presently operate year-round programs for handicapped children. Therefore, the cost increases, over those noted, above that would be necessitated by the decision below could be substantial.

As the decision in this case will have an impact on school districts throughout the country, the National School Boards Association and the National Association of Secondary School Principals urge this court to grant leave to present their views.

Petitioners have consented to the filing of this brief.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	8

TABLE OF AUTHORITIES

Page

Cases

Board of Education of HendrickHudson School District v. Rowley, 458 U.S. 176. 6,8,11,12,13,16

Georgia Association of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (1981). 13

Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir., 1983). 15

Milliken v. Bradley, 418 U.S. 717 (1974). 14

San Antonio ISD v. Rodriguez, 411 U.S. 1 (1973). 14

Scanlon v. Battle, 629 F.2d 269 (3rd Cir. 1980), cert. denied 452 U.S. 968 (1981). 8

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 7,19

Statutes;

Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401. .....Passim

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. 19

Other Authorities (continued)

The Encyclopedia of Education, ...16
McMilland and Free Press.

The Year-Round School 45-15, ...16
Hermansen & Gove.

U.S. Department of Education,.....9
Report to the Congress: "To
Assure the Free Appropriate
Public Education of All
Handicapped Children" 1982.

Year-Round Schools, Morris A. 16
Shepard and Keith Baker.

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Brief of Amici Curiae
National School Boards Association
and National Association of Secondary
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INTEREST OF THE AMICI CURIAE

Amicus curiae, National School Boards Association is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to

promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of local lay control of schools, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. Established in 1940, the National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly elected or appointed lay community representatives, responsible under state

law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that decisions such as the one below threaten the ability of the nation's school boards to effectively educate all the students entrusted to their care by eroding significantly the authority of states and school boards to make educational determinations based upon local and state fiscal and administrative concerns.

Amicus curiae National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 34,000 administrators of public and private secondary schools throughout the United States. These men and women are directly responsible for the education of

some 20 million American youth attending schools in 16,000 school districts. NASSP customarily does not intervene in private litigation. Its interest in this case stems from its strong conviction that the issues presented here are of urgent importance both to all of its members and to public education generally.

Passage of the Education for All Handicapped Children Act of 1975 was widely acclaimed and strongly supported by nearly all elements of the professional education community. However, by 1978, it had already become apparent that the Congress of the United States had no intention of funding education for the handicapped at anything near the level of additional cost and effort which the law, as interpreted by the Executive branch, would require. In

addition, professional advocacy groups were turning to the federal courts in a continuous effort to expand the scope of the Act and the costs of meeting its requirements. As a result, sympathetic educational groups, like the National Association of Secondary School Principals, were forced to express concern by a resolution adopted at its national convention that year, which stated:

> NASSP reaffirms its long-standing commitment to handicapped children and youth to the end that participation in quality educational experiences will enable them to attain their full potential. At the same time, in order to achieve the objectives of P.L. 94-142, NASSP recommends that the federal government insure financial support commensurate with that required of the states and local school districts.
>
> The Association takes a dim view of any and all federal programs which mandate certain services while leaving the

funding burden to states and municipalities least able to afford them.

Since 1978, Congress has actually decreased its financial support for education programs and the Executive branch has sought even deeper cuts in the level of support. Efforts to expand the scope of coverage of the Act through judicial interpretation have continued unabated, however. The case at bar represents just one more such attempt, and amici object on the basis that such interpretations, absent the financial support needed to meet them, are fundamentally unfair.

REASONS FOR GRANTING THE WRIT

1. The lower Court exceeded its authority under the Supreme Court's decision in **Board of Education of Hendrick Hudson School District v.**

Rowley, 458 U.S. 176 (1982), by substituting its own view of the best educational methodology for that of the State by requiring a restructuring of the "traditional" school year to have summer programs available for handicapped children regardless of whether such programs are otherwise available.

2. The lower court violated the Supreme Court's decision in **Southeastern Community College v. Davis**, 442 U.S. 397 (1979) by making affirmative requirements of the state of Georgia to provide summer school services to handicapped children even though the services are not available to non-handicapped children.

3. Even assuming that the services required by the lower court to be provided, are "appropriate", the cost of meeting those requirements is so excessive as to be unreasonable under the standard set in Rowley, supra.

ARGUMENT

The decision of the lower court does not involve a simple judicial interpretation of a statute defining the student services to be provided by Georgia school districts which receive federal funding for handicapped children. To the contrary, the precedent set by this decision and others such as Scanlon v. Battle, 629 F.2d 269 (3rd Cir. 1980), cert. denied, 452 U.S. 968 (1981), affects every school district in the country and could result in a major revision of the very nature of the public educational system.

The potential financial impact to public education of this case is significant. The National School Boards Association estimates that it could cost over one billion dollars more annually to educate the country's handicapped children if the lower court's decision is allowed to stand. This estimate was made on the basis of the statistical information in the Department of Education's Report to Congress: " To Assure the Free Appropriate Public Education of All Handicapped Children" 1982. The average annual cost per handicapped child ($3794) was divided by the number of school days per year (180) to reach $21 per day per handicapped child. In 1982 4,177,689 handicapped children were "counted" for purposes of P.L. 94-142, out of which 844,180 were "mentally retarded" and 348,954 were

"emotionally distrubed" making a total of 1,193,134 million children who would be likely to fall into the Respondent's class. [There were also over 1,468,014 "learning disabled" children who were not used in our computation.] It would cost approximately $840 per handicapped child to provide summer programs of 40 days. That figure times 1,193,134 million children reaches a total national annual expenditure of over a billion dollars. That amount would be increased depending on the number of additional days required (i.e. weekends and holidays in addition to summers) and would also be increased to the extent the average daily expenditures are increased because of support personnel costs -- administration, bus drivers, cafeteria workers, janitors, etc.

This Court has recognized that

financial exigencies are a relevant consideration for courts in determining whether a duty exists to provide a particular service, **Board of Education of the Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982). The lower court, however, discounts the financial consequences of their decision. The decision as to whether to provide an extended school year to a particular child is made on an individual basis and not on the basis of the membership of the child in a particular classification of handicapped child. However, in planning state and local education budgets, state legislatures and local school boards will have to assure that every member of the classification of handicapped children for which a longer education period potentially would be "appropriate" will be counted in the total budget. Thus a

state might be able to meet the mandate of the court but in doing so would have to cut back the remainder of the educational program so as to exclude many other needy students.

If this level of expense is to be mandated of public education providers, it would seem that the mandate should come from the highest court in the land and not from lower courts.

Beyond the financial impact, decisions such as the Eleventh Circuit's threaten to erode state and local decision-making authority in education. The court has gone beyond a requirement that "meaningful access" to the school district not be denied to handicapped children. **Rowley**, supra. The court here seeks to change the very nature of the educational program -- a significant step which surely cannot be countenanced

without a full hearing by the U.S. Supreme Court.

This Court held in **Rowley**, that a court's inquiry in suits brought under the Handicapped Act is twofold: "First, has the State complied with the procedures set forth in the Act; and second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" supra. The district court in the case at bar held that both criteria had been met, but exceeded its authority by inserting its own views on the merits of a nine-month education progam. **Georgia Association of Retarded Citizens v. McDaniel**, 511 F. Supp. 1263, 1266, 1268 and 1282 (1981).

The plight of Respondents in this case, and of their parents, is

heartbreaking indeed. But the public school system is designed only to provide an equal access to all children. If public education is to be required to redesign that system so as to meet all the needs of only one classification of children to the exclusion of others -- that requirement should come from a higher source than a U.S. Circuit Court.

Education, as has been noted by this Court on several occasions, is a state function, **Milliken v. Bradley,** 418 U.S. 717 3112 (1974); **San Antonio ISD v. Rodriguez,** 411 U.S.1 (1973). The state determines first, whether it will provide a free education to its youth and second, who will provide that education. When it makes that first decision it makes it on the basis of the financial resources available and the various needs of the student population. The length of

the school year is not just an arbitrary state or local policy. It defines the parameters of the educational program which the state is agreeing to provide to its school age children. Within those parameters it may be that some children will be provided more services and some less services because of their individual needs -- but the school year identifies the nature of the educational program, not merely the type of services to be provided to individual students.

The lower court's statement that "the nine month school year is a tradition of only recent vintage", **Georgia Association of Retarded Citizens v. McDaniel**, 716 F.2d 1565 (11th Cir., 1983) is not true. Regardless of the merits of the "tradition" it has been a policy of almost universal application in this country since colonial days. The

Year-Round School 45-15, Hermansen & Gove; Year-Round Schools, Morris A. Shepard and Keith Baker; The Encyclopedia of Education, McMillan and Free Press, at page 597. Whether this policy is good or bad or obsolete, as apparently the lower court thinks it is, is irrelevant to the legal issues in this case. As this Court held in **Rowley**, supra courts must "avoid imposing their view of preferable educational methods upon the states."

Some states operate summer educational programs for certain handicapped children. Some states do not. Some local school systems provide summer educational programs through federal funding or other means. Most do not. But the issue here is whether every school district in the country, every state in the country, must operate a summer educational program and provide

services during that summer program to those handicapped children for whom such a program is deemed "appropriate."

Local school systems receive their funding from three sources: local property taxes, federal funding and state funding. State funding is based upon a formula computed as a dollar amount times the average number of children enrolled in the school district during the school year. The school year is set by the state at a prescribed number of days, based on the total amount. In most states the number of school days is set at 180. That does not mean the district may not hold school for a longer period, but the district will receive no state money for any period longer than 180 days.

Although the number of school days set is not scientific or based upon an

educational table of learning, it is also not arbitrary. The state legislature has determined through the very complex budgetary process that it has a certain amount of funds to devote to education. It then determines that it has sufficient funds to provide an education to all of its public school children for a period of 180 days. That 180 day period, therefore, is the period set for all public education in the state. Deviations from that period must be funded through other sources.

The court below is bypassing the orderly political and budgetary process of the state to restructure the educational program of the state and either require the state to extend its education program and fund local school districts for that extended period or to require the local school district to come

up with the additional funding itself through bond issues or some other illusory method.

The court below has exceeded its authority not only under the Education for All Handicapped Children Act but also under Section 504. The decision makes "affirmative" requirements of the state of Georgia under Section 504. As this court stated in Southeastern Community College v. Davis, supra at 410, "The language and structure of the Rehabilitation Act of 1973 reflects a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."

One other unfortunate result of the decision is the potential increase in the

number of requests for due process hearings under the Act and under Section 504. School districts will be in the position of either offering a summer program for every handicapped child who is more than minimally handicapped or providing a due process hearing which itself is costly in both dollars and staff time.

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